88-18

No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF NEW HAVEN, CONNECTICUT,
Petitioner,

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, *et al.*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

This suit for declaratory and injunctive relief was brought by respondent, Mall Properties, Inc., against respondents, Secretary of the Army and officials of the United States Army Corps of Engineers, to challenge the denial of a permit to fill waters of the United States, in order to construct a regional shopping mall, under section 404 of the Clean Water Act, section 10 of the Rivers and Harbors Act and section 102(2)(C) of the National Environmental Policy Act. Following two years of review, the District Court granted summary judgment for respondent, Mall Properties, Inc., on the merits, vacated the Corps' denial decision as being contrary to law, enjoined the Corps on remand from engaging in

previously accepted, long-standing regulatory practice (the consideration of social and economic, as well as environmental effects of the project) and did not retain jurisdiction. Petitioner, City of New Haven, which had successfully sought permit denial before the Corps and was granted intervention under Rule 24(a) of the Federal Rules of Civil Procedure by the District Court, appealed. The First Circuit Court of Appeals dismissed the appeal because the District Court remand order was not a final judgment. The Court of Appeals further held that New Haven could not appeal because the respondent, Secretary of the Army, chose not to appeal.

The questions presented are:

1. Whether, under the Administrative Procedure Act and 28 U.S.C.

§ 1291, a District Court decision granting summary judgment on the merits, vacating an agency decision based on a new legal standard and enjoining previously accepted, long-standing federal agency practice on remand is not a "final decision" because the District Court did not yet grant the respondent, Mall Properties, Inc., ultimately what it wanted (i.e., a fill permit to construct a regional shopping mall).

2. Whether 28 U.S.C. § 1291 forbids a successful party before a federal agency and one granted intervention under Rule 24(a) of the Federal Rules of Civil Procedure, from appealing an adverse District Court decision because the federal agency chooses not to appeal.

PARTIES TO THE PROCEEDINGS

The petitioner is the City of New Haven, Connecticut. The respondents are John O. Marsh, Jr., Secretary of the Army, Lt. General E. R. Heiberg, Chief of the United States Army Corps of Engineers, Col. Thomas A. Rhen, Division Engineer, New England Division and the United States Army Corps of Engineers, Department of the Army. The respondents also include Mall Properties, Inc., a corporation organized under the laws of the State of New York that maintains its principal office in the City and County of New York.

TABLE OF CONTENTS

APPENDIX
(Separate Volume)

TABLE OF AUTHORITIES

CASES - Continued PAGE

CASES - Continued PAGE

CASES - Continued PAGE

STATUTES

MISCELLANEOUS - Continued PAGE

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RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The City of New Haven, Connecticut respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B)[1/] is reported at 841 F.2d 440 (1st Cir. 1988). The denial of the petition for rehearing and suggestion for rehearing en banc (App. A) is unreported at this time. No. 87-1827, slip op. (1st Cir. April 7, 1988). The memorandum and order of the District Court (App. D) is reported at 672 F. Supp. 561 (D. Mass. 1987).

JURISDICTION

The judgment of the Court of Appeals (App. B) was entered on March 11, 1988. The petition for rehearing and suggestion for rehearing en banc (App. A)

1/ The opinions below and other relevant materials are bound in a separate Appendix, hereinafter referred to as "App. ___."

was denied on April 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves issues under 28 U.S.C. § 1291 (Add. at 5a)[2/]; relevant provisions of the Clean Water Act, 33 U.S.C. § 1344 (Add. at 4a-5a); the Rivers and Harbors Act, 33 U.S.C. § 403 (Add. at 3a-4a); the National Environmental Policy Act, 42 U.S.C. § § 4321, 4331(b) & 4332(2)(C)(Add. at 1a-3a); the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)(Add. at 5a); regulations of the United States Army Corps of Engineers, 33 C.F.R. § 320.4(a) & (q) (Add. at 6a-8a); regulations of the Council on

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2/ The texts of all cited statutes and regulations are set forth in the Addendum to this Petition, hereinafter referred to as "Add. at ___."

Environmental Quality, 40 C.F.R. § § 1502.16, 1508.7, 1508.8(a), (b), & 1508.14 (Add. at 8a-11a).

STATEMENT

1. This suit for declaratory and injunctive relief was filed by respondent, Mall Properties, Inc., in the United States District Court for the District of Massachusetts on October 29, 1985 against the respondent, Secretary of the Army and various officials of the United States Army Corps of Engineers ("U.S. ACOE" or "Corps"), under section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, section 10 of the Rivers and Harbors Act ("RHA"), 33 U.S.C. § 403 and section 102(2)(C) of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C). Mall Properties, Inc. challenged the final decision of the

New England Division of the U.S. ACOE denying its application for a permit to deposit one million cubic yards of fill onto the floodplains and wetlands of the Quinnipiac River in North Haven, Connecticut in order to construct a 1.2 million square foot regional shopping mall. The primary basis for its challenge was that the U.S. ACOE was without statutory authority to consider, as part of its permit denial decision, the adverse social, economic and racial effects of the proposed mall on the region, particularly the City of New Haven.

2.a. The City of New Haven is one of the nation's oldest (founded in 1638) and poorest municipalities (7th in the United States according to the 1980 census; 23% of its residents are below the poverty level). It is immediately

adjacent to North Haven and is the largest municipality within the 10-town region that would be served by the proposed mall. Moreover, the proposed mall is less than 8 miles from New Haven's central business district, easily accessible by numerous roadways from various locations throughout the region (including New Haven) and situated on the Quinnipiac River, which flows downstream through New Haven and into its Harbor. The Quinnipiac River has historically been a source of serious flooding problems.

b. The proposed North Haven Mall would generate 55,000 motor vehicle trips per day, 500 to 3,077 tons of solid waste per year, and require the filling of more than 30 acres of wetlands and open water. Final Environmental Impact Statement ("EIS") at IV-10, IV-22,

IV-21. With specific reference to the City of New Haven, the proposed mall would result in the estimated loss of 600 jobs, more than one million dollars a year in tax revenues (1982 dollars), approximately 20 percent of its retail sales, one or more major department stores and other ancillary, adverse social, economic and racial effects. Final EIS, IV-31-34, IV-29.

3. The City of New Haven actively opposed the respondents' application before the U.S. ACOE on environmental (i.e., flooding, wetlands loss), social and economic grounds, including the adverse aesthetic and racial stratification impact it will have on the region. New Haven was granted intervention as of right under Federal Rule of Civil Procedure 24(a) in the District

Court. App. E. The District Court stated:

> The court finds that the City of New Haven has met the requirements for intervention of right. The City of New Haven seeks to intervene under Rule 24 primarily to protect the economic interests the Corps allegedly relied upon in denying the permit. Therefore, unlike the environmental groups, the City of New Haven is directly interested in the "economics" question which plaintiff has raised by this action. An adverse ruling by the court on this issue would limit the City's ability to protect its interests on remand.
>
> Plaintiff [Mall Properties, Inc.] argues that the Corps adequately represents the City's interests in this action. The City replies that the government may not represent its interests adequately, arguing that the government has a duty to protect the public interest, while the City seeks to protect its unique interests. The City has also outlined the history of disagreements between

> the Corps and the City which have arisen during the permit litigation before the Corps. The court also notes that the Corps does not object to the City's intervention in this case.

App. E at 90a-92a. The District Court denied the motion of national and local (Connecticut and North Haven-based) environmental and citizens groups to intervene (id. at 92a), despite the participation of most such groups in the administrative proceeding below. No appeal was taken from the District Court's ruling.

4. The U.S. ACOE, following six years of review and the preparation of an Environmental Impact Statement ("EIS") under the National Environmental Policy Act (42 U.S.C. § 4332(2)(C)), denied respondent Mall Properties' application in a "proposed Final Order"

of November 15, 1984 (App. F) and a "Final Order" of August 20, 1985 (App. H).[3/] The August 1985 denial was based

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3/ In November 1984, the New England Division Engineer affixed his signature to a 45-page "Record of Decision" ("ROD")(App. F) denying respondents' application for a fill permit because of: (i) the "cumulative impact from other past, present and reasonably foreseeable future actions affecting wetlands, flood plains and flooding"; (ii) the "irretrievable loss of 25 acres of wetlands"; (iii) "negative impacts on the quality of life in North Haven"; and (iv) adverse "socio-economic impacts, in particular, those affecting the City of New Haven." Id. at 98a. The factual basis for this last reason for permit denial was, inter alia, that:

> New Haven provides services and an environment for a community with a sizeable low to moderate income population. This population is less able to travel to reach services at other locations. It is more dependent upon a vibrant, viable city to provide services and a healthy, safe and desirable environment.

FOOTNOTE CONTINUED

on three grounds: (i) "a net loss in wetland resources" (App. H at 270a); (ii) "flooding impacts" (id. at 270a); and (iii) the "socio-economic impacts this project would have on the City of New Haven" (id. at 270a).

Before the Corps, and during the District Court proceeding, the Department

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FOOTNOTE 3/ CONTINUED:

> Id. at 98a. This November 1984 ROD was not made public. A copy was made available only to the respondent, Mall Properties, Inc. The fact of its existence was not made known to New Haven until June 1985. Neither the November 1984 ROD nor the August 1985 ROD are designated as "proposed" or "final" -- terminology used only by the District Court.
>
> It is New Haven's position, supported explicitly by the New England Division Engineer, that the August 1985 ROD is premised expressly on and can only be understood in reference to the November 1984 ROD. See App. H at 155a.

of Interior supported the Corps' concerns about wetlands. App. H at 132a. Furthermore, the Department of Housing and Urban Development and the Governor's Office of Policy and Management supported the Corps' concerns about adverse social, economic and racial impacts (id. at 139a) and the Federal Emergency Management Agency supported the Corps' concerns about flooding (id. at 142a). All such supporting comments were submitted to the Corps as part of the EIS process, considered by it pursuant to NEPA and in accordance with its "Public Interest Review" regulation (33 C.F.R. § 320.4)(which requires consideration of "economics" and "the needs and welfare of the people," promulgated pursuant to, inter alia, NEPA, CWA and the RHA (Add. 6a-8a)), and

identified in its August 1985 ROD. App. H at 266a.

5.a. The District Court, on cross-motions for summary judgment filed by all the parties, vacated the U.S. ACOE decision on September 8, 1987. Mall Properties, Inc. v. Marsh, 672 F. Supp. 561 (D. Mass. 1987). App. D. It determined that the permit denial decision, based on the Corps' Public Interest Review regulations (33 C.F.R. § 320.4), NEPA, the CWA and the RHA, "was not made in accordance with law" because, inter alia, "the Corps exceeded its authority . . . by basing its denial of the permit on socio-economic harms [to the region and the City of New Haven] that are not proximately related to changes in the physical environment," caused by the fill. App. D at 26a (emphasis added)(relying on

the "standard" set forth in Metropolitan Edison Co. v. People Against Nuclear Energy (PANE), 460 U.S. 766 (1983)). Contrary to the position of the Petitioner and the U.S. ACOE that, under the Council on Environmental Quality's (CEQ) and U.S. ACOE's regulations, such economic and social impacts must be considered because they are "reasonably foreseeable," (40 C.F.R. §§ 1508.8(b), 1508.7) indirect effects of a regional mall on the region, the District Court stated: "The record reveals that these impacts would not result from any effect the mall would have on the physical environment generally or wetlands particularly. Rather, it is the economic competition for New Haven which would result from the mere existence of a mall anywhere in North Haven . . . [even though the] Corps

did find that there was no alternative site for the mall in North Haven." App. D at 36a.[4/]

Moreover, although Metropolitan Edison involved only the threshold question of whether an EIS was required in light of alleged psychological harm from the restart of an already existing facility (see 460 U.S. at 768), the District Court here (i) concluded the "proximately related" standard applied to all NEPA questions (including, for the first time, which impacts should be addressed following a determination to prepare an EIS for a new project); and (ii) determined that the reasoning of "pre-Metropolitan Edison

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4/ The District Court incorrectly stated that "North Haven is a suburb about 10 miles from New Haven, Connecticut." App. D at 26a-27a. As stated at the outset, New Haven and North Haven are adjacent to each other.

NEPA cases," including those from the 5th, 6th, 7th and 2nd Circuits concerning whether reasonably foreseeable social and economic impacts had to be considered in an EIS that was premised on recognized environmental harm, have been "eliminated by Metropolitan Edison." App. D at 70a.

b. The District Court also stated that it "is elementary . . . that in our system of government, decisions concerning which competing constituency's economic interests ought to be preferred are traditionally made by democratically accountable officials," (App. D at 75a), such as the Governor of Connecticut but not the U.S. ACOE; and that, in the legislative history of the statutes involved here, there "is no suggestion that

[the Corps] was perceived by those enacting the relevant statutes to have expertise concerning whether the economic interests of aging cities or their newer suburbs should as a matter of public policy be preferred." App. D at 75a.[5/]

Finally, the District Court, relying on the First Circuit's decision in Faulkner Hospital Corp. v. Schweicker, 537 F. Supp. at 1071 (D. Mass. 1982), aff'd, 702 F.2d 22 (1st Cir. 1983), vacated the U.S. ACOE decision, enjoined it from any further consideration of the mall's social, economic or racial impacts on the region, including New Haven, and

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5/ It should be noted that New Haven and North Haven were founded in the 17th and 18th Centuries, respectively. Connecticut Blue Book (1987 ed.).

remanded "for further proceedings consistent with this decision." App. D at 84a.[6/]

The District Court did not retain jurisdiction. Additionally, throughout the District Court proceeding, the Justice Department -- on behalf of the Corps -- supported the August 1985 permit denial decision. Moreover, no questions were raised about the adequacy of the evidence before the District Court or the need for the Court to postpone its

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6/ In its Complaint, respondent Mall Properties, Inc., sought a judgment "directing ACOE to issue Mall Properties the subject permits . . . ." (Complaint ¶ 3b). At the suggestion of the District Court, respondent recognized that such relief was not available to it, and that, under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and other jurisprudential considerations, the appropriate judicial remedy was a remand to the U.S. ACOE for further proceedings.

decision on the merits of the issues, pending some further factual development or the resolution of a legal issue by the U.S. ACOE.

6.a. The City of New Haven appealed on September 14, 1987. On November 19, 1987 -- after the expiration of the appeal period -- the Justice Department informed the Court of Appeals, without explanation, that it had determined not to appeal and that New Haven's appeal should be dismissed. No reasoning, case citations, subsequent brief, memoranda or affidavit was ever filed by the Justice Department to support its motion, nor did the Court order it to do so, despite Petitioner's formal request. On December 2, 1987, respondent Mall Properties stated that it was joining the Government's motion to dismiss.

b. On March 11, 1988, a panel

of the Court of Appeals granted, without oral argument, the U.S. ACOE's motion to dismiss, concluding the "remand order" of the District Court is "not a final judgment" and, therefore, not appealable under 28 U.S.C. § 1291. App. B at 5a.

Focusing on Mall Properties' ultimate objective, (i.e., to have the Corps grant the permit to build a regional mall) as being the controlling criterion determining "finality," the Court of Appeals concluded that because "the District Court's remand order does not grant Mall ultimately what Mall wants," the "court's order is but one interim step in the process toward Mall's obtaining its ultimate goal." "The litigation," the Court stated, "has not ended." App. B at 8a.

Moreover, although the Court of Appeals stated that "generally orders

remanding to an administrative agency are not final, immediately appealable orders," (id. at 10a)(citing Pauls v. Secretary of Air Force, 457 F.2d 294 (1st Cir. 1972)), it also characterized other cases where appeals were allowed as "exceptions," to this general rule, such as United States v. Alcon Laboratories, 636 F.2d 876 (1st Cir.), cert. denied, 451 U.S. 1017 (1981). The Court, recognizing that in one such "exception" -- Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984) -- the government was allowed to appeal from a substantive decision on the merits that required a remand, nonetheless concluded that because the U.S. ACOE did not appeal here, Bender had no application to New Haven. App. B at 16a-18a.

The Court of Appeals also concluded that New Haven "has not been foreclosed from participating in the proceedings on remand" because "[p]resumably, it

can urge environmental reasons why the permits should be denied" (id. at 18a), and, after review by the Corps and a subsequent District Court decision, New Haven can "appeal to this Court and . . . argue that the original permit denial . . . was proper . . . ." Id. at 18a. Thus, "review of the socio-economic issue the City now wants to present, is not denied; it is simply delayed." Id. at 18a-19a.

Finally, the Court concluded that allowing the appeal "would violate . . . efficiency . . . ." Id. at 20a. Although stating that, "were review granted now and were we to conclude the District Court erred, an unnecessary administrative proceeding could be averted [fn. omitted]" (id. at 20a-21a), the Court found, relying on Bachowski v. Usery, 545 F.2d 363 (3d Cir. 1976), that

"wisdom" required that "we focus on systemic, as well as particularistic, impacts." Id. at 21a-22a.

7. On March 24, 1988, New Haven filed its Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied by the First Circuit's Order dated April 7, 1988. App. A.

REASONS FOR GRANTING THE PETITION

The decision of the Court of Appeals establishes a pernicious, new rule for determining "finality" in judicial review under the Administrative Procedure Act ("APA") that renders meaningless the efforts of this Court, since at least McGourkey v. Toledo & O.C. Ry., 146 U.S. 536, 544-545 (1892), to provide a modicum of protection to the debilitating effect of delaying justice to an adversely affected party. As a practical matter, the Court of Appeals' opinion

restricts the criteria for determining "finality" to one factor and to the effect on one party: whether the applicant received ultimately what it wanted from a federal agency (in this case, an economically valuable fill permit to construct a mall), regardless of the fact such relief is not judicially available. Under such a standard, the Judicial Branch becomes an advocate for the applicant; assuring, in the end, that the substantive content or the practical effect of a District Court decision will not be meaningfully reviewed until the applicant extracts his alleged economic benefit from the Executive Branch. This Court, as argued below, has never articulated such a fundamentally unfair and constitutionally inappropriate rule. For this reason alone, review by this Court is warranted.

Here, however, much more is at stake. A new, substantive legal standard concerning NEPA, the CWA and the RHA has been articulated by the District Court. It is not trivial. Based on the misapplication of this Court's decision in Metropolitan Edison v. PANE, the District Court "eliminated" more than a decade of judicial precedents from the 2nd, 5th, 7th and 6th Circuits (App. D at 70a); and, it enjoined the U.S. ACOE's long-standing interpretation of its statutory obligations to consider the reasonably foreseeable effects of a project and the "Public Interest," including economic effects and the welfare of the people, in rendering a permit decision. Id. at 26a, 77a, 79a, 83a, 84a. It also has raised troublesome questions about the continued viability of the Council on Environmental

Quality's NEPA regulations defining the "human environment" (40 C.F.R. § 1508.14) and "indirect" (40 C.F.R. § 1508.7) and "cumulative" impacts (40 C.F.R. § 1508.7). See Add. at 11a, 9a. In the end, the District Court impermissibly exceeded its role by failing to accord any deference to the U.S. ACOE's interpretation of the CWA, NEPA and the RHA and the specific effects of this project. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

The District Court's decision remains unreviewed by the Court of Appeals, unreviewable by the U.S. ACOE on remand, and unreviewable by the District Court under the law of the case doctrine. The incongruous effect on New Haven is deadening. We are estopped from challenging it below and precluded from appealing it now. Moreover, as a practical matter, the decision's reasoning is

stifling to any litigant who is dependent on the federal government -- in civil rights, equal employment opportunity or a broad range of environmental cases -- to vindicate an important public and judicially cognizable issue directly affecting such a litigant. Based on an inarticulated philosophy of government or the political discomfort of being on the "wrong side," an agency -- by not appealing -- can thwart the appeal of a party that was a successful proponent before the agency and, in the process, thwart the agency's statutory mission and, in this case, the meritorious reasoning of that agency after six years of study.

The Court of Appeals' decision warrants the timely exercise of this Court's supervision on the question of "finality" and the appeal rights of an intervenor, the petitioner, City of New Haven.

1.a. The Court of Appeals' analysis is flawed in its premise. "We do not view the [District Court] remand order," the Court of Appeals stated, "as meeting the traditional definition of a final judgment, that is, one which 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment,' Catlin v. United States, 324 U.S. 229, 233 (1945)." App. B at 8a. This Court has eschewed such a "traditional definition" as being either the beginning or the end of a proper analysis of whether a decision is "final" under 28 U.S.C. § 1291. The correct analytical premise is that "a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." Gillespie v. United States Steel Corp., 379 U.S. 148, 152

(1964)(emphasis added). And, more recently: "We know, of course, that § 1291 does not limit appellate review to 'those final judgments which terminate an action . . . ,' but rather that the requirement of finality is to be given a 'practical rather than a technical construction.'" Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 170-71 (1974)(emphasis added)(quoting Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545 (1949)).

Having started on a faulty premise and inappropriate definition, the Court of Appeals strayed further. Seemingly seeking a simple factual predicate to meet the "traditional definition," it further defied this Court's teachings and elevated a "verbal formula" (Eisen v. Carlisle and Jacquelin, 417 U.S. at 170), from Pauls v. Secretary of Air Force, 457

F.2d at 297-98)("generally orders remanding to an administrative agency are not final, immediately appealable orders"), into a general rule; concluding that the word "remand" in the formulation of the District Court's relief is a talisman for lack of finality. It is not, as the Court of Appeals own case law (Faulkner Hospital Corp. v. Schweicker, 702 F.2d 22 (1st Cir. 1983), cited by the District Court, should have informed it.[7/] The

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7/ The Court of Appeals' other citations undermined its own formulation of an alleged "rule" correlating a "remand" to a lack of finality. In each of the cases it cites, a substantive decision on the merits was expressly eschewed as premature (App. B at 8a-11a)(see, e.g., Transportation-Communication Division v. St. Louis-San Francisco Rw., 419 F.2d 933, 934 (8th Cir. 1969), cert. denied, 400 U.S. 818 (1970)), wherein the remands involved were intended to resolve a procedural or evidentiary deficiency, certainly

FOOTNOTE CONTINUED

result: the Court of Appeals focused not on the "practical" (Eisen, 417 U.S. at 170), but rather the "technical construction" of the District Court decision (i.e., whether it was a "remand") and its singular effect on the attainment of the respondent, Mall Properties, Inc.'s ultimate goal (a regional shopping mall).

The effect is a radical, pernicious departure from the practical, cautious approach this Court has admonished lower courts to undertake in determining

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FOOTNOTE 7/ CONTINUED:

not the case here. Moreover, the Court of Appeals strained its new "rule" beyond credulity by claiming that Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984) -- where the Court of Appeals concluded an appeal under 28 U.S.C. § 1291 from a decision on the merits was permissible where the District Court had ordered a remand -- is distinguishable from this case only because it was the government, not another defendant, that sought appellate review.

"finality." In the end, the Court of Appeals has taken a rule of limited application (see n. 7, supra), elevated it beyond its purpose and established a general rule of broad application to every case involving a "verbal formula," (Eisen, 417 U.S. at 170), "remand to the agency," contrary to its own customary practice, the rule of the 10th Circuit in Bender v. Clark, 744 F.2d at 1426, and based, inappropriately, on the economic agenda of the respondent, Mall Properties, Inc., vis-a-vis the Executive Branch.

b. The Court of Appeals failed to recognize that the District Court granted summary judgment, under Rule 54 of the Federal Rules of Civil Procedure, on the substantive merits of the single issue all the parties agreed was the fundamental legal linchpin to the U.S. ACOE

permit denial: whether, under the CWA, the RHA, NEPA and the U.S. ACOE "Public Interest Review" regulation, the ACOE had the authority to consider, inter alia, the social and economic effects of the proposed regional mall on the region, particularly New Haven. The District Court by resolving the issue as a matter of law, vacating the agency's decision and enjoining the Corps from any further consideration of such effects, clearly acted in a manner that "was not 'tentative, informal or incomplete' . . . but settled conclusively [respondent Mall Properties, Inc.'s] claim . . . ." Eisen, 417 U.S. at 171 (quoting Cohen, 337 U.S. at 546). It was, in the words of 28 U.S.C. § 1291, a "final decision."

c. This Court has not explicitly articulated a practical construction (see Eisen, 417 U.S. at 170), concerning

"finality" directly applicable to the broad range of APA cases wherein an agency decision is "remanded" for further consideration. The absence of such essential guidance is, once again, a growing lack of harmony (see McGourkey v. Toledo & O.C. Ry., 146 U.S. 536 (1892)), among the Circuits and the formation of a wholly inappropriate and harmful rule within the First Circuit.

2.a. "[T]he danger of denying justice [to New Haven] by delay," (Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950)), permeates the Court of Appeals decision. More is at stake, however, than the indefensible consequence of delaying resolution of the issue concerning the U.S. ACOE's authority to consider social and economic effects. New Haven has been denied the most elementary notions of justice. By

"delaying" New Haven's ability to have the issue even considered until it reaches the Court of Appeals again, the decision places petitioner in a very predictable "catch-22"; constantly forced to argue that it has a right to be heard on a legal issue that neither the U.S. ACOE nor the District Court have any duty to consider. Under such circumstances, New Haven's "standing" under Article III to even argue economic or social reasons for permit denial would certainly be challenged. So too would New Haven's standing to argue some "physical environmental" issues as that term is defined by the District Court. Moreover, it could be two more rounds of procedural and jurisdictional (i.e., standing) litigation before the Court of Appeals reaches the merits of the social-economic issue, if ever. The U.S. ACOE could deny the

permit again, on other grounds, and the District Court could affirm the denial.

This, of course, is not the end of the serious impediments the Court of Appeals has created. Its analysis of res judicata and law of the case provides doubtful comfort. Dickinson, 338 U.S. at 511. In order to diminish the risk that the Court of Appeals is incorrect on the issues of "finality," res judicata and law of the case, New Haven is, as a practical matter, precluded from seeking judicial review in any other jurisdiction except Massachusetts even though the District Court below did not retain jurisdiction and petitioner is entitled to file any subsequent challenge to the Corps in Connecticut or the District of Columbia. "This scenario of 'possibilities' is too conjectural to avoid reaching a more just result" (Bender v. Clark,

744 F.2d at 1428), particularly where, as here, the Court of Appeals acknowledged that "were review granted now and were we to conclude the District Court erred, an unnecessary administrative proceeding could be averted." App. B at 21a.

b. By making the attainment of the respondent, Mall Properties, Inc.'s, economic goal the essential focus of its analysis, the Court of Appeals made no meaningful effort to undertake an evaluation of the effect of its decision on the parties. There is no "inconvenience and cost[ ]," (Eisen, 417 U.S. at 171), to Mall Properties, Inc. in the immediate resolution of the legal issue it has wanted resolved since filing its Complaint in October 1985. There is no discernable harm to the U.S. ACOE; no government project is at stake nor is the filling of wetlands or the construction

of suburban shopping malls a statutory or policy objective. The adverse harm to New Haven and the the administration of the CWA, NEPA and the RHA is clear and immediate.

The City of New Haven has actively opposed the construction of the North Haven Mall since 1980. It took the U.S. ACOE almost six years to render its ROD, 45 pages in length, denying the permit. The litigation has now consumed almost three additional years. For a municipality like New Haven -- the 7th poorest in the United States, according to the 1980 census, for cities over 100,000 -- such an effort has placed a substantial burden on New Haven's taxpayers. Moreover, the resolution of the legal issues in this case are of fundamental importance to the entire metropolitan region.

c. The fundamental flaw in the District Court's reasoning stemmed from its wholly unwarranted intrusion into interpreting the statutory obligations of the U.S. ACOE. Relying on the respondent, Mall Properties, Inc.'s, characterization of the permit denial as being based on economic competition[8/] rather than social and economic impacts, the District Court decided that: (i) the U.S. ACOE is not "democratically accountable" (App. D at 75a) and cannot make such a "competition" judgment; and, therefore, (ii) the Court "is called upon to discern the scope of the authority to consider economic factors which has been

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8/ App. D at 36a. The notion of "economic competition" was nowhere addressed by the U.S. ACOE in its ROD and clearly not reflected in the "Conclusions" reached in its November 1984 or August 1985 ROD's.
FOOTNOTE CONTINUED

delegated to, and exercised by, the Corps." Id. at 42a. Unable to find any direct legislative history under the RHA, CWA or NEPA, that "unambiguously expressed [the] intent of Congress" (Chevron U.S.A., Inc. v. NRDC, 467 U.S. at 843), that the U.S. ACOE was precluded from considering social and economic factors, the District Court grafted onto that history this Court's "proximately related" standard from Metropolitan Edison (id. at 59a-60a), although such a standard is nowhere referred to or cited

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FOOTNOTE 8/ CONTINUED:

> Moreover, no federal or state agency raised any question about "competition"; all participants before the U.S. ACOE -- HUD, the Department of the Interior/U.S. Fish and Wildlife Service and the Connecticut Office of Policy and Management -- stated that adverse environmental, social, economic or racial impacts warranted permit denial.

in the legislative history in this context. Moreover, the District Court made no meaningful effort to assess whether "the agency's [interpretation] is based on a permissible construction of the statute" (Chevron U.S.A., Inc. v. NRDC, 467 U.S. at 843), despite the fact such social or economic effects have been: (i) considered by the Corps since 1933 (see United States v. Dern, 289 U.S. 352 (1933); Zabel v. Tabb, 430 F.2d 199, 207 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971)(The RHA "itself does not put any restrictions on denial of a permit or the reasons why the Secretary may refuse to grant a permit . . . ."); (ii) integrated into the Corps' Public Interest Review regulation since 1974 (App. D at 51a); (iii) required, under the reasonably foreseeable standard, to be

considered by the CEQ regulations[9/]; and (iv) formally considered, based on six years of legal and factual analysis in this case and, with even greater breath and detail, in Bersani v. EPA, 674 F. Supp. 405 (N.D.N.Y. 1987), aff'd, Nos. 87-6275, 87-6295, slip op. (2d Cir. June 8, 1988)(economic viability and market-place impacts of proposed mall on the region considered by the U.S. ACOE and EPA in CWA permit decision). The District Court, in the end, emerged as the "democratically accountable" (App. D at 75a) Branch of government, failed to show any deference to the U.S. ACOE's interpretation of its obligations (Udall v. Tallman, 380 U.S. 1, 16 (1965); Morton v. Ruiz, 415 U.S. 199, 231 (1974)), and

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9/ In fact, the District Court does not even cite the CEQ regulations.

"substitute[d] its own construction of a statutory provision for a reasonable interpretation made by the . . . agency." Chevron U.S.A., Inc. v. NRDC, 467 U.S. at 844.

The U.S. ACOE, for an indeterminate period of time, is now free to impose within the First Circuit -- if not elsewhere -- a new legal standard concerning indirect, induced or cumulative social and economic impacts that departs from its previously accepted practice, as acknowledged by the U.S. ACOE in the District Court. See Federal Defendant's Reply Memorandum, on Cross-Motions for Summary Judgment at 9. At stake is the daily administration of three major statutes: NEPA, CWA and RHA.

Moreover, no court -- including the Court of Appeals for the Eighth Circuit relied upon by the District Court here (App. D at 68a) -- has applied the

"proximately related" standard beyond the limited, threshold question of whether an EIS should be prepared. In Olmsted Citizens For a Better Community v. United States, 793 F.2d 201 (8th Cir. 1986), the Eighth Circuit was confronted with the threshold question of whether an EIS was required based not on any allegations of environmental harm but on the possible "introduction of weapons and drugs into the area . . . [and] . . . an increase in crime . . . ." Id. at 205. It concluded an EIS was not necessary, relying on the "proximately related" standard of Metropolitan Edison, 460 U.S. 766 (1983), the fact that "we are not convinced that Olmsted Citizens has identified any significant impacts on the physical environment . . ." (Olmsted, 793 F.2d at 206) and that "[e]ven before Metropolitan Edison" (id.), a similar result would have lied. Moreover, subsequent court decisions have

interpreted Metropolitan Edison to be limited to the threshold question of whether NEPA applies in the absence of recognized environmental impacts. See Pacific Northwest Bell Telephone Co. v. Dole, 633 F. Supp. 725, 727 (W.D. Wash. 1986); Ono v. Harper, 592 F. Supp. 698, 701 (D. Haw. 1983); Animal Lovers Volunteer Assoc. v. Weinberger, 765 F.2d 937, 938 (9th Cir. 1985); Glass Packaging Institute v. Regan, 737 F.2d 1083, 1091-93 (D.C. Cir.), cert. denied, 469 U.S. 1035 (1984). Here, it is beyond peradventure that: (i) significant physical, environmental impacts were present (i.e., depositing one million cubic yards of fill; harm to 30 acres of wetlands; flooding problems, etc.); (ii) the U.S. ACOE prepared a multi-volume EIS -- a legal and factual determination not challenged below; (iii) numerous federal and state agencies substantiated the environmental,

social and economic impacts of the project; and (iv) the demonstrable, physical, economic and social impacts on the region, including New Haven, was thoroughly documented and found by the U.S. ACOE in its EIS and ROD's. Under such circumstances, the District Court decision -- by extending the "proximately related" standard of Metropolitan Edison and precluding consideration of the regional mall's social and economic effects on the region -- is directly in conflict with those of at least the 2nd and 9th Circuits (Rochester v. United States Postal Service, 541 F.2d 967, 973 (2d Cir. 1976); Bersani v. EPA, Nos. 87-6275, 87-6295, slip op. (2d Cir. June 8, 1988); Davis v. Coleman, 521 F.2d 661, 676-77 (9th Cir. 1975)); the CEQ regulations requiring consideration of "reasonably foreseeable" effects (including social and economic effects that are "later in

time or farther removed in distance," 40 C.F.R. 1508.8(b)); and the Corps' own Public Interest Review regulation; and, without reason and contrary to sound judicial administration, the limited holdings of the 9th (Animal Lovers Volunteer Assoc. v. Weinberger, 765 F.2d at 938-39) and D.C. Circuits (Glass Packaging Institute v. Regan, 737 F.2d at 1091).

Certainly, the "issue is a serious and unsettled one . . . ." Bender v. Clark, 744 F.2d at 1428. At stake is the uncertainty in outcome of such an important matter and the rights of numerous permit applicants, the U.S. ACOE and the public (Paluso v. Mathews, 573 F.2d 4, 8 (10th Cir. 1978)), as well as the fate of thousands of acres of wetlands within New England, if not elsewhere; all placed at risk without appellate review. "The public interest . . . would lose by such a procedure." Brown Shoe Co. v. United

States, 370 U.S. 294, 309 (1962).

3. The Court of Appeals determination that the Government enjoys some special status vis-a-vis intervenors with respect to appellate rights (App. B at 14a-15a) conflicts directly with Bryant v. Yellen, 447 U.S. 352, 366-68 (1980), the protection afforded by Rule 24(a) of the Federal Rule of Civil Procedure and the precedents of at least the 9th and D.C. Circuits. If not corrected, its consequences will be insidious; lurking, perhaps inconspicuously for now, with grave effect on those who, in the context of litigation, are dependent on the government to vindicate individual rights or seek judicial redress on matters of public importance.

The City of New Haven was granted the right to intervene under Federal Rule of Civil Procedure 24(a). App. E at 86a. As an intervenor, New

Haven has the right to appeal an adverse ruling regardless of whether the government seeks such an appeal. Bryant v. Yellen, 447 U.S. at 366-68; NL Industries, Inc. v. Secretary of Interior, 777 F.2d 433, 436 (9th Cir. 1985); United States v. AT&T, 642 F.2d 1285, 1293-94 (D.C. Cir. 1980). It would defeat the entire purpose of Rule 24(a) if the finding of "inadequate representation" had application only in the District Court. The Government could, with impunity and without explanation, simply defeat the interests of the intervenor by acquiescing in the views of its adversary through "settlement," whether expressed in formal terms or undertaken with the quiet passage of the time beyond which it must appeal. See Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983).

The insidious nature of the Court of Appeals determination also is

founded in the absence of an explanation for the Government's conduct. As this Court is aware, the Record of Decision was issued by the New England Division of the U.S. ACOE; defending that decision in litigation is not its responsibility. The Justice Department's determination not to appeal may have been premised on a philosophical discomfort with the New England Division's denial of a permit or the political discomfort of being on the "wrong side" in the Court of Appeals. It also may have simply missed the jurisdiction deadline for filing a notice of appeal. Its motion to dismiss New Haven's appeal in this case was made without citations or legal argument. In fact, in the 5 months the U.S. ACOE's motion was pending, it was never requested by the Court of Appeals -- despite our insistence -- to explain either why it was made or what the effect would be if this

appeal proceeded. Nonetheless, the Court of Appeals fashioned a rule denying an intervenor from appealing based, in part, on its own assumptions, or those extracted from other cases, as to the Government's motivation or the effect on New Haven. In the end, it protected the U.S. ACOE decision not to appeal, imposed enormous litigation burdens on New Haven (let alone on others who actively opposed the issuance of the permit before the U.S. ACOE) and radically altered the factual and legal posture of the case, without any reasoning articulated by the rule's primary beneficiary, the U.S. ACOE.

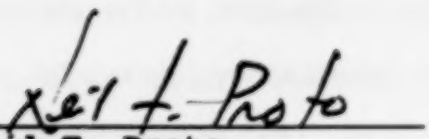
In any event, New Haven is entitled to "all the prerogatives of a party litigant" (United States v. AT&T, 642 F.2d at 1294), including the right to appeal since, as is abundantly obvious here, New Haven's interests were "not

adequately represented in the decision [by the U.S. ACOE] not to appeal." Id.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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July 5, 1988

ADDENDUM

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STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. Section 101(b)(5) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4331(b) provides in pertinent part:

> (b) In order to carry out the policy set forth in this chapter [42 U.S.C.S. §§ 4321 et seq.], it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may--
>
> * * *
>
> (5) achieve a balance between population and resource use which will permit high standards of living an a wide sharing of life's amenities; . . .

2. Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332, provides in pertinent part:

[Section 102(2)(C)]

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter [42 U.S.C. §§ 4321 et seq.], and (2) all agencies of the Federal Government shall--

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code [5 U.S.C.S. § 552], and shall accompany the proposal through the existing agency review processes;

3. Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, provides in pertinent part:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any . . . structures in any . . . navigable river, or other water of the United States, outside established harbor lines, or where no harbor

lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; . . .

4. Section 404 of the Clean Water Act, 33 U.S.C. § 1344, provides in pertinent part:

> (a) Discharge into navigable waters at specified disposal sites. The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.
>
> (b) Specification for disposal sites. Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous

zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

* * *

(d) The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

5. The Administrative Procedure Act, 5 U.S.C. § 706(2)(A) provides in pertinent part:

The reviewing court shall --

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * *

(D) without observance of procedure required by law; . . .

6. 28 U.S.C. § 1291 provides:

The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . .

7. The "Public Interest Review" regulation of the Army Corps of Engineers, 33 C.F.R. § 320.4 (a) and (q), provides:

> (a) Public Interest Review. (1) The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards,

floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. For activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency's 404(b)(1) guidelines. Subject to the preceding sentence and any other applicable guidelines and criteria (See §§ 320.2 and 320.3), a permit will be granted unless the district engineer determines that it would be contrary to the public interest.

(q) Economics. When private enterprise makes application for a permit, it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the marketplace. However, the district engineer in appropriate cases, may make an independent review of the need for the project from the perspective of the overall public interest. The economic benefits of many projects are important to the local community and contribute to needed improvements in the local economic base, affecting such factors as employment, tax

revenues, community cohesion, community services, and property values. Many projects also contribute to the National Economic Development (NED)(i.e., the increase in the net value of the national output of goods and services).

8. The regulations of the Council on Environmental Quality, 40 C.F.R. § 1502.16, 40 C.F.R. § 1508.7, 40 C.F.R. § 1508.8(a)(b), and 40 C.F.R. § 1508.14 provide:

> § 1502.16 Environmental consequences.
>
> This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented . . .
>
> * * *

(1502.16 (cont.))

It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local . . . land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. . . .

* * *

(g) Urban quality . . . and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

§ 1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can

result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both

beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.14 Human environment.

"Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

9. Federal Rule of Civil Procedure 24(a) provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction

which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

* * *

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 1988 I caused copies of the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit and the Appendix thereto to be served via first class mail, postage prepaid, or by hand delivery ("*"), upon:

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July 5, 1988

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